Halleen Australian Livestock Traders Pte Ltd v SPH Marketing Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–4355 OF 1998
ABDUL ALIM J
1 OCTOBER 2009

Civil Procedure — Injunction — Ex parte injunction — Whether abuse of process — Non-disclosure of material facts by applicant — Non-compliance with O 29 r 1(2A) of the Rules of the High Court 1980 — Injunction granted to stop discharge of plaintiff's cattle from ship at port — Granting of injunction based on debt owed to applicant by third party — Whether interlocutory injunction used as instrument of oppression — Whether injunction wrongly granted

Shipping and Navigation — Carriage of goods — Bill of lading — Significance and importance of — Whether holder could obtain delivery of goods at port of destination — Whether to be differentiated from delivery order

Tort — Detinue — Unlawful retention of goods — Defendants refused to discharge cargo — Whether plaintiff rightful owner of cargo — Whether defendants liable for detinue

Tort — Trespass to goods — Unlawful retention of goods — Defendants refused to discharge cargo — Whether plaintiff rightful owner of cargo — Whether defendants liable for trespass

The plaintiff was a company incorporated in Western Australia. It was a livestock trader selling cattle. The second defendant ('KPM') managed South Port, Port Klang. On 18 August 1998 the plaintiff shipped on board mv Carabao 1,807 heads of cattle from the port of Broome, Australia to Port Klang. The bill of lading ('P2') showed the plaintiff as both the shipper and consignee. According to the first defendant ('SPH'), one Sari Pelita Sdn Bhd ('Sari Pelita') a client of SPH had transacted with SPH whereby at the request of Sari Pelita, SPH would import cattle for sale to it. Pursuant to an alleged debt amounting to RM408,442.30 owed by Sari Pelita to SPH, the latter commenced a civil action at the Shah Alam High Court on 24 August 1998 and by way of summons in chambers, obtained an injunction order on 25 August 1998 prohibiting Sari Pelita and KPM, inter alia, from taking control, custody and/or possession of the cattle (not exceeding RM500,000) from

MV Carabao scheduled to arrive at Port Klang on 25 August 1998. When the ship berthed on 26 August 1998 at 10.30am, the cattle were discharged from the vessel to Sari Pelita as per the local documents, namely the integrated import document and the customs declaration form. At about 3.45pm on 26 August 1998, the injunction order was served by SPH on KPM and at about 5pm on the same day KPM instructed to stop discharging the cattle from the vessel. Some cattle remained on board. At about 6pm on 26 August 1998, Sari Pelita gave a letter of undertaking to SPH and consequently SPH's solicitors waived the enforcement of the injunction order and also withdrew its enforcement on KPM. KPM however did not heed the waiver stating that it would only release the remaining cattle on board the vessel if the plaintiff procured a court order directing the release of the cargo. In that meanwhile the plaintiff intervened in the proceedings and by a consent order dated 27 August 1998 the injunction order was set aside with a direction to release the cargo to the plaintiff, which did take place on 27 August 1998. In the present suit, the plaintiff claimed that the actions by SPH amounted to an abuse of process, trespass to goods and detinue and as for KPM, it had wrongfully withheld the cattle despite the request by SPH to so release it. The plaintiff also claimed that KPM committed abuse of process, trespass to goods and detinue.

Held, allowing the plaintiff's claim with costs:

(1) Sari Pelita in receiving the cargo acted as the agent of the plaintiff. The plaintiff was the consignee and holder of the bill of lading. The bill of lading named the plaintiff as the consignee and also the consignor and its holder was the owner of the cattle. There was absolutely nothing that showed Sari Pelita had imported through Port Klang (see paras 17–18, 20 & 23).

(2) SPH had abused the process of the court to apply for and obtain the ex parte injunction. There has been non-compliance by SPH of O 29 r 1(2A) of the Rules of the High Court 1980 and was a clear case of misleading the court (see para 23).

(3) Material facts are mandatorily required to be disclosed at the ex parte stage and an interlocutory injunction should never be used as an instrument of oppression. In no circumstances too, an ex parte injunction ought to have been applied to obtain security for SPH in this case. The plaintiff not only had to endure the wrongful withholding of its cattle on board the ship but also their further detention by KPM despite the settlement between SPH and Sari Pelita by the giving of an undertaking (see para 24).

(4) A bill of lading is a document of title. A holder of a bill of lading enables the holder to obtain delivery of the goods at the port of destination and, during transit, it enables the holder to 'deliver' the goods by merely

transferring the bill of lading. A delivery order, much heavily relied upon by SPH and KPM is not a document of title. Its utility is only for purposes after the goods have landed and for delivery to the person named in the order. A delivery order is not a document of title and does not apply to goods on board a ship like a bill of lading does (see paras 29–30).

(5) SPH was therefore liable to the plaintiff for abuse of process, trespass and detinue. KPM was also liable to the plaintiff for trespass and detinue when it withheld discharge of the cargo (see para 36).

[Bahasa Malaysia summary

Plaintif merupakan syarikat yang ditubuhkan di Australia Barat. Plaintif merupakan pedagang ternakan yang menjual lembu. Defendan kedua ('KPM') menguruskan Pelabuhan Selatan, Pelabuhan Klang. Pada 18 Ogos 1998 plaintif mengangkut sebanyak 1,807 ekor lembu ke atas mv Carabao dari pelabuhan Broome, Australia ke Pelabuhan Klang. Bil muatan ('P2') menunjukkan bahawa plaintif merupakan pengangkut dan penerima konsain. Menurut defendan pertama ('SPH'), Sari Pelita Sdn Bhd ('Sari Pelita') pelanggan SPH telah berurusan dengan SPH di mana atas permintaan Sari Pelita, SPH akan mengimport lembu untuk dijual. Berikutan dengan dakwaan hutang yang berjumlah RM408,442.30 oleh Sari Pelita kepada SPH, SPH kemudiannya memulakan tindakan sivil di Mahkamah Tinggi Shah Alam pada 24 Ogos 1998 dan menerusi saman dalam kamar, telah memperoleh suatu perintah injunksi pada 25 Ogos 1998 menghalang Sari Pelita dan KPM, antara lain, daripada mendapat kawalan, jagaan dan/atau milikan lembu tersebut (tidak melebihi RM500,000) daripada mv Carabao yang dijadualkan akan berlabuh di Pelabuhan Klang pada 25 Ogos 1998. Apabila kapal tersebut berlabuh pada 26 Ogos 1998 jam 10 pagi, lembu tersebut dipindahkan dari kapal tersebut kepada Sari Pelita, menurut dokumen-dokumen tempatan itu, iaitu dokumen import bersepadu dan juga borang perisytiharan kastam. Kira-kira jam 3.45 petang pada 26 Ogos 1998, SPH menyerahkan perintah injunksi tersebut kepada KPM dan kira-kira jam 5 petang pada hari yang sama, KPM diarahkan menghentikan perpindahan lembu tersebut dari kapal tersebut. Beberapa ekor lembu masih berada dalam kapal tersebut. Kira-kira jam 6 petang pada 26 Ogos 1998, Sari Pelita menyerahkan surat akujanji kepada SPH dan selanjutnya peguam cara SPH mengetepikan pelaksanaan perintah injunksi tersebut dan menarik balik pelaksanaannya terhadap KPM. KPM walau bagaimanapun tidak mengendahkan penarikan tersebut menyatakan bahawa KPM hanya akan melepaskan lembu yang masih ada di atas kapal tersebut jika plaintif mendapatkan perintah mahkamah mengarahkan pelepasan kargo tersebut. Sementara itu, plaintif mencelah dalam prosiding tersebut dan menerusi suatu perintah persetujuan bertarikh 27 Ogos 1998, perintah injunksi tersebut diketepikan dan digantikan dengan suatu arahan untuk melepaskan

kargo tersebut kepada plaintif, yang berlaku pada 27 Ogos 1998. Dalam tindakan guaman ini, plaintif mendakwa bahawa tindakan oleh SPH merupakan satu pencabulan proses, pencerobohan terhadap barangan dan detinu dan KPM telah secara salah menyimpan lembu tersebut walaupun telah diminta oleh SPH untuk melepaskannya. Plaintif juga mendakwa bahawa KPM telah mencabul proses, menceroboh barangan dan detinu.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Dalam menerima kargo tersebut, Sari Pelita bertindak sebagai ejen plaintif. Plaintif merupakan penerima konsain dan pemegang bil muatan. Bil muatan menamakan plaintif sebagai penerima konsain dan juga pemberi konsain dan pemegangnya adalah pemilik lembu tersebut. Tiada apa pun yang menunjukkan bahawa Sari Pelita telah mengimport melalui Pelabuhan Klang (lihat perenggan 17–18, 20 & 23).

(2) SPH telah mencabul proses mahkamah apabila memohon dan memperoleh injunksi ex parte tersebut. Terdapat ketidakpatuhan oleh SPH ke atas A 29 k 1(2A) Kaedah-Kaedah Mahkamah Tinggi 1980 dan adalah jelas merupakan kes yang mengelirukan mahkamah (lihat perenggan 23).

(3) Fakta-fakta material dikehendaki secara mandatorinya didedahkan pada peringkat ex parte dan suatu injunksi interlokutori tidak harus digunakan sebagai alat untuk menindas. Suatu injunksi ex parte juga tidak harus, dalam apa jua keadaan pun, dipohon bagi mendapatkan jaminan untuk SPH dalam kes ini. Bukan sahaja plaintif harus menanggung akibat penahanan lembunya secara salah di atas kapal tersebut, malah juga terpaksa menanggung penahanan selanjutnya oleh KPM walaupun terdapat persetujuan antara SPH dan Sari Pelita dengan pemberian akujanji tersebut (lihat perenggan 24).

(4) Bil muatan merupakan satu dokumen milikan. Pemegang bil muatan membolehkan pemegangnya memperoleh penyerahan barangan di destinasi pelabuhan tersebut, dan semasa persinggahan, bil tersebut membolehkan pemegangnya untuk 'menyerahkan' barangan tersebut dengan hanya memindahkan bil muatan itu. Satu pesanan penghantaran, yang digunapakai oleh SPH dan KPM bukanlah dokumen milikan. Kegunaannya hanyalah selepas barangan tersebut telah 'mendarat' dan untuk penyerahan kepada orang yang namanya tertera di atas pesanan tersebut. Suatu pesanan penghantaran bukanlah dokumen milikan dan tidak terpakai ke atas barangan di atas kapal sepertimana bil muatan (lihat perenggan 29–30).

(5) Oleh itu SPH bertanggungan ke atas plaintif bagi pencabulan proses, pencerobohan dan detinu. KPM juga bertanggungan ke atas plaintif

A bagi pencerobohan dan detinu apabila KPM menghalang pelepasan kargo tersebut (lihat perenggan 36).]

Notes

For a case on unlawful retention of goods, see 12 *Mallal's Digest* (4th Ed, B 2005 Reissue) para 630.

For cases on bill of lading, see 11 *Mallal's Digest* (4th Ed, 2005) paras 1276–1413.

For cases on ex parte injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2948–2999.

C For cases on trespass to goods in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1686–1694.

Cases referred to

Brink's-Mat Ltd v Elcombe & Ors [1988] 1 WLR 1350, CA (refd)

D *Hu Kim Ai (trading as Geneve Timepiece) & Anor v Liew Yew Thoong (trading as Crystal Hour)* [2004] 7 MLJ 590; [2004] 3 AMR 305, HC (refd)

Industrial Concrete Products Bhd v Concrete Engineering Products Bhd [2001] 2 MLJ 332; [2001] 2 AMR 2151, HC (refd)

E *Kembara Dinamik Corporation Sdn Bhd v Bahtera Sensasi Sdn Bhd* [2004] 3 AMR 312, HC (refd)

Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425, CA (refd)

Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad b Hj Hassan & Ors [2005] 1 MLJ 654; [2004] 4 AMR 30, HC (refd)

F

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2A)

MS Murthi (Norsilati Abdullah with him) (Murthi & Partners) for the plaintiff.

G *Hasnal Rezua (Atan Mustapha with him) (Ainul Azam & Co) for the first defendant.*

Mohan Krishnan (Prem Ramachandran with him) (Kumar Partnership) for the second defendant.

H **Abdul Alim J:**

[1] The plaintiff is a company incorporated under the laws of Western Australia with its office in Perth, Australia. It is a livestock trader selling cattle I to several countries in and around South East Asia. It has no presence in Malaysia.

[2] The first defendant ('SPH') is a company dealing in exportation and importation of livestock at all material times.

[3] The second defendant ('KPM') is an incorporated company that manages South Port, Port Klang.

[4] On 18 August 1998 the plaintiff shipped on board mv Carabao 1,807 heads of cattle from the port of Broome, Australia to Port Klang. The bill of lading ('P2') showed the plaintiff as both the shipper and consignee.

[5] According to SPH, one Sari Pelita Sdn Bhd ('Sari Pelita') a client of SPH had transacted with SPH whereby at the request of Sari Pelita, SPH would import cattle for sale to it.

[6] Pursuant to an alleged debt amounting to RM408,442.30 owed by Sari Pelita to SPH, the latter commenced a civil action at the Shah Alam High Court (MT4–22–1076 of 1998) on 24 August 1998 and by way of summons in chambers, obtained an injunction order ('P3') on 25 August 1998 prohibiting Sari Pelita and KPM, inter alia, from taking control, custody and/or possession of the cattle (not exceeding RM500,000) from mv Carabao scheduled to arrive at Port Klang on 25 August 1998.

[7] Cattle were discharged from the vessel when it berthed on 26 August 1998. That was 10.30am. The cattle were released to Sari Pelita and not the plaintiff as per the local documents, namely the integrated import document ('D8') and the customs declaration form ('D7').

[8] At about 3.45pm on 26 August 1998 the injunction order was served by SPH on KPM and at about 5pm. On the same day the senior traffic officer of KPM was instructed by his superiors to stop discharging the cattle from the vessel. Some cattle remained on board.

[9] At about 6pm on 26 August 1998 Sari Pelita gave a letter of undertaking ('D5') to SPH for transfer of two titles to properties currently deposited with SPH or to deposit securities of equivalent value within 14 days. Consequently SPH's solicitors waived the enforcement of the injunction order and also withdrew its enforcement on KPM.

[10] KPM however did not heed the waiver stating that it would only release the remaining cattle on board the vessel if the plaintiff procured a court order directing the release of the cargo. In that meanwhile the plaintiff intervened in the proceedings and by a consent order dated 27 August 1998 the injunction order was set aside with a direction to release the cargo to the plaintiff, which did take place on 27 August 1998.

[11] At the outset it is noted that in the statement of claim the plaintiff pleaded that the injunction order was addressed to Sari Pelita and 'Port Klang Authority' and *not* KPM who was a different entity. The injunction order did *not* direct KPM to act upon it. The said order was in reference to goods allegedly belonging to Sari Pelita and no one else. The plaintiff claims that the undischarged cattle on board MV Carabao was without question the property of the plaintiff, as the undisputed evidence in the bill of lading had named it as the consignee and which was in the possession of the plaintiff and was produced to KPM.

[12] The plaintiff pleaded SPH had abused the process of the High Court Shah Alam in order to obtain security for its alleged claim against Sari Pelita. The plaintiff alleges SPH did not put material facts before the court nor had diligently sought information to ascertain the ownership of the cattle on board the said vessel.

[13] The plaintiff claims the actions by SPH amounted to an abuse of process, trespass to goods and detinue and as for KPM, it had wrongfully withheld the cattle despite the request by SPH to so release it. The plaintiff also claims KPM to have also committed abuse of process, trespass to goods and detinue.

[14] The pleaded defence of SPH (the first defendant), basically are as follows:

(a) the documents with which it had in the execution of the injunction order to restrain the goods showed that the ownership of it on board the vessel belongs to Sari Pelita; and

(b) the bill of lading was erroneous to state the plaintiff as consignor and consignee.

[15] The pleaded defence of KPM (the second defendant) basically are as follows:

(a) that the plaintiff was not the consignee of the cargo as the local documents (D7 and D8) showed that Sari Pelita was the consignee;

(b) that KPM did not have sight or any knowledge of the bill of lading and solely relied on the local documents which stated that Sari Pelita was the consignee and hence it had no authority to allow the plaintiff to take delivery of the goods on board;

(c) that KPM denied it acted wrongly on the injunction order and puts the plaintiff to strict proof;

(d) on the issue of the waiver of injunction and withdrawal of the enforcement of the injunction order, KPM claimed that SPH or its lawyers had no power to waive it and only the court could authorise it and also SPH cannot request KPM to release the cargo to the plaintiff as the latter is not the named consignee of the cargo;

(e) that the injunction order, if so agreed to be waived by KPM may result in it being guilty of contempt of court and had to pay damages to relevant parties and that the withdrawal notice by SPH's lawyers had no effect in law; and

(f) that it (KPM) denied trespass and detinue, and rallied the point that it had faithfully complied with the injunction order of the court.

[16] All parties before me agreed that the issue of liability be first determined and damages be assessed before the senior assistant registrar in the event the court holds the defendants liable to the plaintiff.

[17] The pleaded case of the plaintiff shows that there is an agency agreement ('P1') between the plaintiff and Sari Pelita. Sari Pelita in receiving the cargo acted as the agent of the plaintiff as it was not possible for the plaintiff to import cattle into Malaysia without a local agent. As agent it had applied for and obtained various permits. This evidence is corroborated by PW2, the manager of Sari Pelita. The latter is to handle all importation procedures as required by the Malaysian authorities. The plaintiff was to pay Sari Pelita commission of AUD0.15 cents per kg of cattle sold and AUD2 per goat or sheep sold.

[18] The plaintiff is the undisputed consignee and holder of the bill of lading. SPH had served an injunction order against Sari Pelita at 12.30pm. When the South Port officers were shown by the plaintiff the bill of lading, they allowed the cattle to be discharged but later witheld it at about 5.15pm on that afternoon. At about 6pm, despite a letter of waiver by SPH, the port officers insisted that an order setting aside the injunction be produced. The plaintiff then withdrew the original bill of lading from the ship's captain without prejudice to their rights against SPH and KPM.

[19] The plaintiff's witness ('PW1') confirmed in his testimony that the bill of lading was produced twice to KPM at 1.30pm and 4.30pm on 26 August 1998 after the service of the injunction order but without success for the release and discharge of the cattle to Sari Pelita, the agent of the plaintiff.

[20] The only witness for SPH, Zulkifli Abd Kadir, a senior manager of SPH ('DW1'), testified the following simple yet plain evidence that clarified the plaintiff's pleaded case:

(a) that the bill of lading named the plaintiff as the consignee and also the consignor and its holder is the owner of the cattle;

(b) that SPH recognises the cattle on board MV Carabao is the property of the plaintiff;

(c) that in his ('DW1') affidavit filed in support of the injunction application for which an order was obtained, he did not disclose that Sari Pelita had imported cattle from Australia; and

(d) that once SPH knew the plaintiff is the rightful owner of the cargo (cattle) it did not proceed with the enforcement of the injunction order and which it really did when its lawyers were instructed ('D14').

[21] Two witnesses testified for KPM. Mohamad Fawzi Mustafa ('DW2') a traffic officer at South Port testified the following:

(a) that he agrees that the owner of the cargo on board MV Carabao belongs to the plaintiff;

(b) that at 5.15pm on the day in question the cargo was under the control and custody of the master of the ship pursuant to the bill of lading and the owner is the named consignee who is the plaintiff and that all cargo was to be delivered to the representative of the plaintiff, Sari Pelita;

(c) that KPM had interfered with the cargo in the possession of the master of the ship because it was served with the injunction order ('P3') and proceeded to refuse the unloading; and

(d) that in a bill of lading the consignor and consignee can be the same party but KPM did not place reliance on that document of title but rather the local port documents as in D7 and D8 which showed that the cargo belongs to Sari Pelita.

[22] DW3, Hasnur Hashim, a legal officer of KPM. He was an ineffective and inapt witness and whatever he testified was unavailing to the case for KPM. He plainly said he had no actual knowledge of the facts and circumstances of the case which took place on 26 and 27 August 1998. He joined Northport (M) Bhd in July 2004.

LIABILITY OF SPH AND KPM

[23] SPH had filed in the Shah Alam High Court a writ of summons against Sari Pelita on 24 August 1998 which has an endorsed two page

statement of claim for goods sold and delivered to the value of RM408,442.30 owing since 7 February 1997. On the same day SPH filed an injunction application to seize cattle, sheep and goats that are being imported by Sari Pelita via Port Klang. From the evidence before this court there was absolutely nothing that Sari Pelita had imported through Port Klang. DW1, Zulkifli Abd Kadir, the senior manager of SPH who had affirmed the affidavit in support for the ex parte injunction admitted and he testified as follows:

> Maka tiada apa-apa dokumen yang saya telah ekshibitkan dalam afidavit bagi permohonan injunksi yang menunjukkan bahawa Sari Pelita bawa ternakan dari Australia.

This establishes and the court so finds that SPH had abused the process of the court to apply for and obtain the ex parte injunction. There has been non-compliance by SPH of O 29 r 1(2A) of the Rules of the High Court 1980 and is a clear case of misleading the court.

[24] Material facts are mandatorily required to be disclosed at the ex parte stage and an interlocutory injunction should never be used as an instrument of oppression (see *Brink's-Mat Ltd v Elcombe & Ors* [1988] 1 WLR 1350; *Hu Kim Ai (trading as Geneve Timepiece) & Anor v Liew Yew Thoong (trading as Crystal Hour)* [2004] 7 MLJ 590; [2004] 3 AMR 305; *Metrowangsa Asset Management Sdn Bhd & Anor v Ahmad b Hj Hassan & Ors* [2005] 1 MLJ 654; [2004] 4 AMR 30). In no circumstances too, an ex parte injunction ought to be applied to obtain security for SPH in this case (see *Kembara Dinamik Corporation Sdn Bhd v Bahtera Sensasi Sdn Bhd* [2004] 3 AMR 312). The plaintiff not only had to endure the wrongful witholding of its cattle on board the ship but also their further detention by KPM despite the settlement between SPH and Sari Pelita by the giving of an undertaking.

[25] That the action/claim by SPH against Sari Pelita (under writ of summons) was not maintainable, there appears to be no rebuttal evidence at all by SPH in the evidence at trial. This is no surprise. The suit was filed on 24 September 1998 and till today nothing has come about of it. The suit filed by SPH was for the obtaining of the ex parte injunction and nothing else as PW2 so had testified at the trial. This is a damning piece of evidence of the abuse of the court's power by SPH which had caused the goods of the plaintiff to be wrongfully detained by KPM. SPH had withdrawn the suit after six years then.

[26] The Court of Appeal in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 has this to say in illustrating abuse of process:

A Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it B becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on tort of collateral abuse of process.

Halsbury's Laws of England, (4th Ed), Vol 45 at p 630, para 1381 explains C when the action lies:

> 1381 When the action lies. It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and, as a result to cause damage. The plaintiff need not prove want of reasonable and probable cause, nor need the proceedings have terminated in D his favour. He must show that the defendant has used the proceedings for some improper purpose. This tort differs from malicious prosecution in that proof of any special damage is sufficient.

James Foong J (now Federal Court judge) in *Industrial Concrete Products Bhd* E *v Concrete Engineering Products Bhd* [2001] 2 MLJ 332; [2001] 2 AMR 2151 at p 367 (MLJ) sets out the essential elements of abuse of process:

> (1) the process complained must be initiated;
>
> (2) the purpose for initiating that process must be some purpose other than to F obtain genuine redress which the process offers; in other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and
>
> (3) the plaintiff must have suffered some damage or injury in consequence.

G This court has no qualms in its finding that in the factual circumstances outlined above and as defined in the law, there was established an abuse of the court's power by SPH.

H **[27]** The injunction order wrongly or obtained in error by SPH was set aside by the plaintiff the following day. It was earlier served on KPM at 12.30pm on 26 August 1998 and it stopped the discharge of the cattle at 5.15pm the same day. The very actions of SPH and KPM had not only caused the intrusion but also the detention of the plaintiff's goods.

I **[28]** The mighty claim by the plaintiff squarely rests on the bill of lading of which it is the holder. Opposed to this is the claim by SPH which relied upon the port documents, namely the customs declaration, import permit, health certification and delivery order.

[29] A bill of lading is a document of title. Payne & Ivamy, *Carriage of Goods by Sea* ((10th Ed) at pp 55, 56 and 66) describes a bill of lading which has various aspects in the eyes of the law being: **A**

(a) It is very good evidence of the contract of affreightment, though not the contract itself, for the contract is usually entered into before the bill of lading is signed. **B**

(b) It is a receipt for the goods shipped and contains certain admissions as to their quantity and condition when put on board.

(c) It is a document of title, without which delivery of the goods cannot normally be obtained. **C**

[30] A holder of a bill of lading enables the holder to obtain delivery of the goods at the port of destination and, during transit, it enables the holder to 'deliver' the goods by merely transferring the bill of lading. A delivery order, much heavily relied upon by SPH and KPM is not a document of title. Its utility is only for purposes after the goods have landed and for delivery to the person named in the order. A delivery order is not a document of title and does not apply to goods on board a ship like a bill of lading does. **D**

E

[31] An ensuing pertinent question that must be asked is thus the following. Who is the owner of the cattle when its discharge from the ship was halted at 5.15pm on 26 August 1998? The obvious answer is the holder of the bill of lading. The other documents, namely the health certificate, the customs declaration, the import permit and delivery order cannot take the place of a bill of lading which is recognised document of title in shipping law. **F**

[32] Faced with the legality or validity of the bill of lading, SPH had waived the injunction order it obtained and its further enforcement. KPM, like SPH argued that Sari Pelita is the owner of the cattle and insisted the setting aside of the injunction order despite its waiver by SPH. The port operators were shown the bill of lading by both PW1 and PW2. They so testified in their evidence in court. But the cattle were thus further detained on board the ship. KPM fell into serious blunder when it did not pay regard to the waiver by SPH of the injunction order. The irony of the situation was that when KPM witheld the discharge of the cattle at 6pm that day, there was no claimant to the goods. There was only the plaintiff claiming to the goods. KPM nevertheless stubbornly insisted in the setting aside of the injunction order. It wonders this court as to why it did so even when the injunction order is directed to and refers to 'Perbadanan Pelabuhan Kelang' pure and simple, *and not* KPM. Does this show that KPM was never at all bound by the said order and should have facilitated its waiver by SPH? **G** **H** **I**

[33] The injunction order obtained by SPH against Sari Pelita in the circumstances of this case relates to a private remedy between them and despite its waiver by SPH, KPM committed fiasco in further detaining the cattle. For each of their conduct this court finds it wrongful. Any argument belabouring Sari Pelita as the consignee of the cargo is devoid of any truth and is an afterthought to escape liability.

[34] Some excerpts from the evidence at trial deserve final mention to demonstrate and make known the plaintiff's assertion that as a consignee under the bill of lading it is the undisputable owner of the goods (cattle):

(a) DW1 (witness for SPH) admitted that in his affidavit in support of the injunction application for the injunction order he did not disclose any evidence that Sari Pelita had imported cattle from Australia; it is to be noted too that when the order was obtained, the goods were not within the jurisdiction as MV Carabao was in international waters;

(b) DW1 admitted that the holder of the bill of lading which is the plaintiff, is the owner of the property and when it became aware of it withdrew from its enforcement (injunction order), when instructed by its lawyers (see D14); and

(c) DW2, while asserting to have the right to see the bill of lading also admitted that at 5.15pm 26 August 1998, the cargo on board was under the control and custody of the master of the ship pursuant to the bill of lading and at that time the owner of the cargo is the consignee named in the bill of lading *and not* the property of Sari Pelita, and further that the cargo was to be delivered to the representative of the consignee.

[35] The definitions for detinue and trespass are well explained in *Halsbury's Laws of England* (4th Ed), Vol 45. Detinue is explained in para 1416:

> 1416 Forms of action at common law ...
>
> Detinue was of earlier origin. Its gist was the unlawful failure to deliver up good when demanded. It lay when a person wrongfully detained the goods of another, or improperly parted with possession of them. It also lay when a bailee lost goods and could not show that the loss was without default on his part. It was the appropriate form of action when the return of title deeds or other specific chattels was required. It did not afford a remedy when a bailee restored goods in a damaged condition, nor where he misused goods without causing loss or destruction.

Trespass to goods is explained in paras 1491, 1492, 1494 and 1495:

> 1491 What constitutes trespass to goods

Trespass to goods is an unlawful disturbance of the possession of goods by seizure or removal, or by a direct act causing damage to the goods.

The subject matter of trespass to goods must be a personal chattel which is the subject of lawful possession.

An action may be maintained in England or Wales for a trespass to goods committed in a foreign country, if the act is not justifiable by the law of that country.

1492 Unintentional harm

If an act of trespass is intentional, it is no defence to show that the defendant honestly but mistakenly believed that he had the right to perform the act. It may be that an action for trespass to goods also lies for purely negligent conduct causing injury to goods. In such a case it appears that the onus of proving negligence rests upon the plaintiff.

1493 ..

1494 Possession or right to possession

A plaintiff in an action of trespass to goods must prove that, at the time when the unlawful act was committed, he had actual possession, or a right to the immediate possession, of the chattel in question. If his right accrued subsequently to the unlawful act, he must prove that his right related back to the time of the act, and that the act was unlawful when it was committed.

As against a wrongdoer any possession is sufficient, provided that it is complete and unequivocal.

1495 Right of property

The right of property in goods imports a right to the possession, and where no one is lawfully in possession the owner may sue in trespass even though he has no actual physical control over the goods. Proof that a person has a property in a chattel is *prima facie* evidence that he is in possession, and similarly, proof of possession is *prima facie* evidence of title. When the possession is doubtful, it is attached by law to the title. If a person has a property in a chattel at his election, by bringing an action of trespass in respect of the chattel he elects to take the chattel and is competent to sue.

[36] This court is of the judgment and so orders the first defendant ('SPH') liable to the plaintiff with costs for abuse of process, trespass and detinue. This court also further orders the second defendant ('KPM') liable to the plaintiff with costs for trespass and detinue from 6pm on 26 August 1998 (when it witheld discharge of the cargo) to 4pm on 27 August 1998. Damages to be assessed by the deputy registrar.

Plaintiff's claim allowed with costs.

Reported by Kanesh Sundrum